GENE L. BROWN

IBLA 71-69 Decided August 15, 1972

Appeal from decision of Anchorage, Alaska, land office requiring the submission of adequate final proof within thirty days, failing which homestead entry A-062537 would be canceled.

Affirmed, entry canceled.

Alaska: Homesteads -- Homesteads (Ordinary): Cancellation of Entry -- Homesteads (Ordinary): Habitable House

This Department does not have authority to extend the statutory life of a homestead entry to permit the entryman to construct a habitable house on it after the expiration of the five year period, and the entry will be canceled if appellant fails to have a habitable house on the entry at the time for submission of final proof, absent a showing that equitable adjudication will lie.

Alaska: Homesteads -- Homesteads (Ordinary): Cancellation of Entry -- Homesteads (Ordinary): Cultivation

A homestead entry is properly canceled for failure of the entryman to meet the cultivation requirements where he admits that he merely cleared the land by the end of the fourth year.

Alaska: Homesteads -- Homesteads (Ordinary) -- Cancellation of Entry -- Homesteads (Ordinary): Residence

A homestead entry is properly canceled for failure of the entryman to meet the residence requirements of the homestead law in that the entryman was absent from the homestead for a period of time exceeding five months each entry year and notice of the absence was not submitted to the land office as prescribed by statute.

APPEARANCES: Gene L. Brown, pro se.

OPINION BY MR. STUEBING

Gene L. Brown appeals to the Board of Land Appeals from the decision of the Anchorage, Alaska, land office requiring that he submit acceptable final proof within 30 days, failing which his homestead entry would be canceled. 43 U.S.C. §§ 270, 161 et seq. (1970). The Bureau so acted because Brown failed to file final proof in support of the entry within five years after acknowledgment of the claim, as required by 43 CFR 2511.3-4(a)(1) (1972).

Brown made settlement on the claim on May 20, 1965, and filed his notice of location on May 28, 1965. The land office acknowledged the claim on June 1, 1965. The land was unsurveyed and contained 160 acres. 1/ At the time of his filing of the notice of location there were no improvements on the claim.

Appellant alleged that he and his wife lived off the entry in a cabin by Lake Chilkoot from July to September 1965. During this time they constructed a road to the homestead. They also camped at the homestead while building a cabin which was completed in July 1965. Subsequent to the construction, Brown learned that the site of the cabin was on land withdrawn for Power Site No. 139. He completed a second cabin in December 1965 which was lost in the flood of 1967.

Brown and his wife resided on the homestead from July 1965 to October 1966 when they left the homestead and did not return until April 1967. In the latter part of 1969 Brown completed the clearing of 23.8 acres of land.

The applicable parts of § 164 of the Homestead Law require that:

> No certificate shall be given or patent issued therefore until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, * * * proves by himself and by two credible witnesses that he, * * * [has] a habitable house upon the land and [has] actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit * * * then * * * he, * * * shall be entitled to a patent, as in other cases provided by law: Provided, That upon filing in the local land office

1/ The Bureau's records showed that appellant's claim was in partial conflict with Power Site Classification No. 439 dated July 10, 1957.

> notice of the beginning of such absence the entryman shall be entitled to a continuous leave of absence from the land for a period not exceeding five months in each year after establishing residence, and upon the termination of such absence the entryman shall file a notice of such termination in the local land office, but in case of commutation the fourteen months' actual residence required by law must be shown, and the person commuting must be at the time a citizen of the United States: * * * Provided further, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry and until final proof, * * * but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation * * *.

The sole issue on appeal is whether appellant has satisfied the Homestead Act in regard to (1) submitting final proof, (2) establishing residence, (3) having a habitable house, (4) cultivating the land.

By appellant's own showings we find that he has not met any of these requirements. 43 CFR 2511.3-4(a)(1) (1972) requires submission of final proof within five years. The Bureau acknowledged his entry on June 1, 1965; therefore, the time for filing of the final proof expired on May 31, 1970. Final proof has not been made.

Appellant has not satisfied the residency requirement of the Act. His absence from the homestead from October 1966 to April 1967 exceeds the five-month absence allowed by the Act in each entry year. There was neither a notice of absence filed with the land office prior to this absence nor a notice of termination of absence upon his return. 2/ See 43 CFR 2511.4-2(e)(1) (1972). Apparently, after his return, there was also a second absence. Appellant states that at the time of the flood he was living in a camp trailer in Haines, where he was working. He did not resume residence on the entry, but purchased a house trailer for his residence. This could not be moved to the homestead because of road conditions.

2/ The only correspondence on file relating to this absence was a letter written by appellant on December 4, 1966, informing the land office that he had left the homestead in October and planned to return in the spring. He gave a Tacoma, Washington, address.

As for having a habitable house on the premises, appellant made two attempts to construct a dwelling. Although we recognize appellant's efforts, the fact remains that there was no habitable house on the claim at the end of the five-year period. If appellant cannot show by final proof that he had a habitable house on the entry upon the termination of the five-year period, the entry must be canceled. Mrs. Harrill Berry, A-31108 (April 1, 1970); Cf. United States v. Russell G. Wells, 78 I.D. 163 (1971); see also Jan A. Wawrytko, 2 IBLA 78 (1971). The flood occurred in September, 1967. The life of the entry did not expire until May 31, 1970, affording ample time for replacement.

Brown contends that when he lost his house in the flood, he notified the land office of this fact, but the office did not advise him that he must have a house on the property at the time of submitting final proof. The law places the burden upon the applicant for land to understand and comply with the requirements of the particular law under which he seeks to obtain title to the land; and his failure to understand such requirements cannot be disregarded on the basis of the failings of others. See Arnold H. Echola, A-30831 (November 16, 1967).

Appellant also claims that he requested an extension of time to construct his house, but the land office denied the request. The law does not grant this Department the authority to extend the life of the homestead beyond the five-year period prescribed by statute; therefore, we find that the request for an extension of time was properly denied. Mrs. Harrill Berry, supra.

We might speculate that had the entryman complied with the other requirements of the law and regulations but suffered the loss of his house through some calamity which occurred near the termination of the statutory period, the case might well have afforded a basis for equitable adjudication. But where, as here, the entryman is not in compliance with the other mandatory requirements equitable adjudication will not lie as there has not been substantial compliance with the law. United States v. Russell G. Wells, supra.

Appellant's clearing of 23.8 acres of land falls short of the cultivation requirement of the statute. Brown admits that this clearing was not completed until late 1969; therefore, he failed to meet the time requirement imposed by the Act of having at least 1/16 of the entry cultivated, beginning with the second year of entry and not less than 1/8 for the following years until submission of final proof.

Also, Brown indicates that he has done nothing more than clear the land. Although the Department has never attempted to lay down a fixed rule as to what constitutes satisfactory cultivation, it has long held that the breaking, planting, or seeding and tillage for a crop which constitute cultivation must include such acts and must be done in such a manner as to be reasonably calculated to produce profitable results. 3/ A mere pretense of cultivation will not satisfy the requirements of the law. Jess H. Nicholas, A-30065 (October 13, 1964), aff'd in Nicholas v. Secretary of the Interior, 385 F.2d 177 (9th Cir. 1967); U.S. v. Dale Gladys Garrett, A-31064 (May 28, 1970). Clearing of land does not comply with this standard of cultivation. United States v. Wilma L. Oldaker, A-30378 (August 26, 1965).

Appellant claims that he could have obtained a patent under the regulations allowing a reduction in the cultivation requirements. However, he never applied for a reduction in cultivation as prescribed by 43 CFR 2511.4-3(b)(1) (1972). Upon notification to the manager of the land office within 60 days of a misfortune, 43 CFR 2511.4-3(b)(2) (1972) allows a reduction when misfortune renders the entryman reasonably unable to cultivate the prescribed area, but such reduction applies only to the period of disability. Assuming the flood was such a misfortune, this regulation would allow a reduction only for the period of influence of the flood, but would not apply to other years in which Brown failed to satisfy the cultivation requirements. Also, Brown failed to notify the land office within 60 days of the flood as required by the regulations.

Appellant has failed to meet the requirements of submission of final proof, residence, establishment of a habitable house, and cultivation. His request for an extension cannot be granted as there is no authority for extending the time to meet the requirements. Equitable adjudication may be evoked to accept late proofs, however, it is limited to those cases where the applicant has demonstrated substantial compliance with the law, failing only in some minor particular. 43 CFR 1871.1-1. Here, appellant has failed in every aspect to meet the mandatory requirements.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R.

3/ The Departmental regulation for cultivation, 43 CFR 2511.4-3 (1972), is stated in similar language.

12081), the decision of the land office is affirmed and the entry is canceled.

Edward W. Stuebing
Member

We concur:

Anne Poindexter Lewis
Member

Joan B. Thompson
Member